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Bond M&E Sdn Bhd v Pali PTP Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C-121–06 OF 2020
ALIZA SULAIMAN J
28 FEBRUARY 2022

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Building and Construction Law — Adjudication decision — Application — Direct payments to subcontractor — Claim for direct payment from principal — Adjudication decision in favour of subcontractor against main contractor — Whether principal liable to pay subcontractor the outstanding amount due by main contractor — Whether there was money due or payable by principal to subcontractor at the time of receipt of notice for direct payment — Whether term 'adjudicated amount' included interest and costs — Construction Industry Payment and Adjudication Act 2012 ss 30 & 31

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This was an application by the plaintiff pursuant to ss 30 and 31 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') and O 5, 7, 28, 69A and/or O 92 r 4 of the Rules of Court 2012 ('the ROC') for an order that the defendant, as the principal company to JEKS Engineering Sdn Bhd ('JEKS'), pay directly to the plaintiff, the amounts which were due and owing to the plaintiff by JEKS, being the party against whom an adjudication decision ('Bond AD') by the was made. The defendant appointed JEKS, as its main contractor for a project with a contract sum amounting to RM136,300,000. JEKS then appointed the plaintiff as a nominated subcontractor in respect of the project. Payment disputes which arose between the parties was then referred to the arbitration, and subsequently led to the filing of the present application. The issues that arose for determination were: (a) whether the adjudication proceedings between JEKS and the defendant where an adjudication decision was made in favour of JEKS. The adjudicator issued his corrected adjudication decision ('JEKS AD'), reducing the adjudicated sum from RM8,782,677 to RM8,512,737; and (b) the adjudication proceedings between the plaintiff and JEKS for an outstanding sum of RM3,440,981.83 under the subcontract together with interests and costs which led to the Bond AD. Thus, the present application. The plaintiff prayed for the defendant to be ordered to make direct payment of: (i) the adjudicated amount of RM3,387,425.44 according to the Bond AD; (ii) the sum of RM42,404.08 being interest at the rate of 7.7%pa calculated from the due date of each certificate until 22 July 2019; (iii) continuing interest at the rate of 7.7%pa on the adjudicated amount calculated from 23 July 2019 until 3 September 2019; (iv) continuing interest at the rate of 7.7%pa on the adjudicated amount calculated from 4 September 2019 until full settlement;

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A and (v) the sum of RM83,979.08 being the costs of the adjudication proceedings.

Held, allowing the application in part:

B (1) The plaintiff had fulfilled the condition as stipulated in sub-s 30(1) of the CIPAA as the plaintiff obtained the Bond AD against JEKS; JEKS has failed to pay the adjudicated amount, simple interest and costs of the adjudication proceedings to the plaintiff as determined by the adjudicator; and the plaintiff has made a written request ('notice') for the C defendant to pay the adjudicated amount, simple interest and costs of the adjudication proceedings directly to the plaintiff. The defendant did not comply with the said notice and did not serve a notice in writing to JEKS for JEKS to show proof that it has paid the adjudicated amount, simple interest and costs of the adjudication proceedings to the plaintiff. D Therefore, the defendant's failure was fatal to the defence that there was no money due or payable by the defendant to JEKS at the time of the receipt of the notice. Thus, the plaintiff has fulfilled all the conditions to entitle it to invoke the remedy in s 30 of the CIPAA and for the rejection of the defendant's defence to the plaintiff's application. The plaintiff had E fulfilled all the conditions to entitle it to invoke the remedy in s 30 of the CIPAA and for the rejection of the defendant's defence to the plaintiff's application (see para 19–20).

(2) Section 4 of the CIPAA provides that 'principal' means 'a party who has F contracted with and was liable to make payment to another party where that other party has in turn contracted with and was liable to make payment to a further person in a chain of construction contracts'. The defendant was a party which had contracted with JEKS as its main contractor, and was liable to make payment to JEKS by virtue of the G JEKS AD, and JEKS has contracted with, and was liable to make payment to the plaintiff by virtue of the Bond AD. The court was therefore satisfied that for purposes of s 30 of the CIPAA, the defendant was a 'principal' within the meaning of s 4 of the CIPAA and that there was money payable by the defendant to JEKS at the time when the H defendant received the notice (see paras 27 & 32).

(3) By using these different words: 'adjudication decision'; 'adjudicated amount'; 'interest'; and 'costs' in the CIPAA, and especially where this was done repeatedly, the legislature must have intended to refer to different things. If interest and cost were intended to be included within I the meaning of 'adjudicated amount' in sub-ss 30(1) and (3) of the CIPAA, express words to that effect would have been inserted in the sub-ss as the terms 'interest' and 'costs' are used in the other parts of the CIPAA. Therefore, 'adjudicated amount' in sub-ss 30(1) and (3) of the CIPAA do not include interest and costs (see paras 40 & 47–48).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif di bawah ss 30 dan 31 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') dan Aturan 5, 7, 28, 69A dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk satu perintah bahawa defendan, sebagai syarikat utama kepada JEKS Engineering Sdn Bhd ('JEKS'), membayar terus kepada plaintif, jumlah yang perlu dibayar dan terhutang kepada plaintif oleh JEKS, berdasarkan keputusan adjudikasi ('Bon AD') yang dibuat. Defendan melantik JEKS, sebagai kontraktor utamanya untuk projek dengan kontrak berjumlah RM136,300,000. JEKS kemudiannya melantik plaintif sebagai subkontraktor yang dicalonkan berkenaan dengan projek tersebut. Pertikaian pembayaran yang timbul antara pihak-pihak kemudiannya dirujuk kepada prosiding timbang tara, dan kemudiannya membawa kepada pemfailan permohonan ini. Isu-isu yang timbul untuk penentuan adalah: (a) sama ada prosiding penghakiman antara JEKS dan defendan di mana keputusan penghakiman dibuat memihak kepada JEKS. Penimbangtara memberikan keputusan penghakimannya yang diperbetulkan ('JEKS AD'), mengurangkan jumlah tersebut daripada RM8,782,677 kepada RM8,512,737; dan (b) prosiding penghakiman antara plaintif dan JEKS dengan jumlah tertunggak sebanyak RM3,440,981.83 di bawah sub-kontrak bersama faedah dan kos yang membawa kepada Bon AD. Oleh itu, permohonan ini difailkan. Plaintif memohon supaya defendan diperintahkan untuk membuat pembayaran terus: (i) jumlah yang diadili sebanyak RM3,387,425.44 menurut Bon AD; (ii) jumlah RM42,404.08 adalah faedah pada kadar 7.7%pa dikira dari tarikh akhir setiap sijil sehingga 22 Julai 2019; (iii) faedah berterusan pada kadar 7.7%pa ke atas amaun yang dikira dari 23 Julai 2019 hingga 3 September 2019; (iv) faedah berterusan pada kadar 7.7%pa ke atas amaun yang diadili yang dikira dari 4 September 2019 sehingga penyelesaian penuh; dan (v) jumlah RM83,979.08 sebagai kos prosiding adjudikasi.

Diputuskan, membenarkan permohonan secara sebahagian:

(1) Plaintif telah memenuhi syarat-syarat yang ditetapkan di dalam sub-s 30(1) APAIP iaitu plaintif mendapatkan Bon Ad terhadap JEKS; JEKS telah gagal membayar jumlah yang diadili, faedah dan kos prosiding adjudikasi kepada plaintif seperti yang ditentukan oleh penimbangtara; dan plaintif telah membuat permintaan bertulis ('notis') untuk defendan membayar jumlah yang diadili tersebut, faedah dan kos prosiding adjudikasi terus kepada plaintif. Defendan tidak mematuhi notis tersebut dan tidak menyampaikan notis secara bertulis kepada JEKS untuk JEKS menunjukkan bukti bahawa mereka telah membayar jumlah yang diadili, faedah dan kos prosiding adjudikasi kepada plaintif. Oleh itu, kegagalan defendan ini adalah fatal kepada pembelaannya bahawa tiada wang yang perlu dibayar atau perlu dibayar oleh defendan kepada JEKS pada masa penerimaan notis tersebut. Oleh itu, plaintif

telah memenuhi semua syarat untuk melayakkannya untuk memohon remedi dalam s 30 APAIP dan untuk penolakan pembelaan defendan terhadap permohonan plaintif (lihat perenggan 19–20).

(2) Seksyen 4 APAIP memperuntukkan bahawa 'prinsipal' bermaksud 'pihak yang telah berkontrak dan bertanggungjawab untuk membuat pembayaran kepada pihak lain di mana pihak lain telah berkontrak dan bertanggungjawab untuk membuat pembayaran kepada orang lain dalam rantaian kontrak pembinaan'. Defendan adalah pihak yang telah berkontrak dengan JEKS sebagai kontraktor utamanya, dan bertanggungjawab untuk membuat pembayaran kepada JEKS berdasarkan JEKS AD, dan JEKS telah berkontrak dengan, dan bertanggungjawab untuk membuat pembayaran kepada plaintif berdasarkan Bond AD. Oleh itu, mahkamah berpuas hati bahawa dengan merujuk s 30 APAIP, defendan adalah 'prinsipal' dalam maksud s 4 APAIP dan terdapat wang yang perlu dibayar oleh defendan kepada JEKS pada masa defendan menerima notis tersebut (lihat perenggan 27 & 32).

(3) Dengan menggunakan perkataan yang berbeza ini: 'keputusan adjudikasi'; 'jumlah yang diadjudikasi'; 'faedah'; dan 'kos' dalam APAIP, dan terutama ketika ianya dilakukan berulang kali, badan perundangan semestinya berniat untuk merujuk kepada perkara yang berbeza. Sekiranya faedah dan kos dimaksudkan untuk dimasukkan dalam makna 'jumlah yang diadjudikasi' dalam sub-ss 30(1) dan (3) APAIP, perkataan yang jelas untuk kesan tersebut akan dimasukkan ke dalam sub-s kerana istilah 'faedah' dan 'kos' digunapakai di bahagian lain APAIP. Oleh itu, 'jumlah yang diadjudikasi' di dalam sub-ss 30(1) dan (3) APAIP tidak termasuk faedah dan kos (lihat perenggan 40 & 47–48).]

Cases referred to

B Cor Geotechnics Sdn Bhd v Panzana Enterprise Sdn Bhd [2019] MLJU 1030; [2019] 1 LNS 1393, HC (refd)

Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor [2020] MLJU 311, HC (refd)

CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2019] MLJU 1215; [2020] 1 CLJ 75, CA (refd)

CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2017] MLJU 2275; [2018] 1 LNS 380, HC (refd)

HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors [2018] MLJU 1859; [2018] 1 LNS 1938, HC (refd)

HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case [2021] 8 MLJ 347, HC (refd)

Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd [2019] 2 MLJ 362; [2019] 2 CLJ 229, CA (refd)

JEKS Engineering Sdn Bhd v PALI PTP Sdn Bhd and another case [2021] MLJU

1627; [2021] MLRHU 1234, HC (refd)
Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, Garnishee) [1988] 1 MLJ 434; [1988] 1 CLJ Rep 645, HC (refd)
Lee Lee Cheng (F) v Seow Peng Kwang [1960] 1 MLJ 1, CA (refd)
Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd [2021] 8 MLJ 275, HC (refd)
Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits [2016] MLJU 691; [2016] 1 LNS 805, HC (refd)
PCom Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor [2020] MLJU 118; [2020] 1 LNS 130, HC (refd)

Legislation referred to

Arbitration Act 2005 s 8
Building and Construction Industry Security of Payment Act 2004 [SG] s 24
Companies Act 2016 s 466
Construction Industry Payment and Adjudication Act 2012 ss 4, 12(2), (4), (5), 13, 15, 16, 16(1), (2), 17(2), 18(1), (2), 24(a), 25(o), 28, 28(1), (2), 29, 29(1), (2), (4)(d), 30, 30(1), (2), (3), (4), (5), 31, 36(1)(d), Part IV
Interpretation Acts 1948 and 1967 s 17A
Rules of Court 2012 O 5, O 7, O 28, O 49 r 1, O 69A, O 92 r 4

Deepak Mahadevan (with Faeza Suraya bt Roselan) (Azmi Fadzly Maha & Sim) for the plaintiff.
Sivabalan Sankaran (with Tharmini Paramasivan) (Tan Swee Im, Siva & Partners) for the defendant.

Aliza Sulaiman J:

INTRODUCTION

[1] This was an application by the plaintiff pursuant to ss 30 and 31 of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA') and O 5, O 7, O 28, O 69A and/or O 92 r 4 of the Rules of Court 2012 ('the ROC 2012') for an order that the defendant, as the principal company to JEKS Engineering Sdn Bhd ('JEKS'), pay directly to the plaintiff, the amounts which are due and owing to the plaintiff by JEKS, being the party against whom an adjudication decision by the learned adjudicator, Mr Michael Teo Seng Siong, dated 3 January 2020 ('Bond AD') was made.

[2] Specifically, the plaintiff prayed for the defendant to be ordered to make direct payment of:

(a) the adjudicated amount of RM3,387,425.44 according to the Bond AD;

(b) the sum of RM42,404.08 being interest at the rate of 7.7%pa (Maybank Base Lending Rate at 6.7%pa + 1%) calculated from the due date of each certificate (as claimed by the plaintiff) until 22 July 2019 (date of the payment claim);

(c) continuing interest at the rate of 7.7%pa on the adjudicated amount calculated from 23 July 2019 until 3 September 2019;

(d) continuing interest at the rate of 7.7%pa on the adjudicated amount calculated from 4 September 2019 until full settlement; and

(e) the sum of RM83,979.08 being the costs of the adjudication proceedings.

[3] After hearing oral submissions by Mr Deepak Mahadevan representing the plaintiff, and Mr Sivabalan Sankaran who appeared for the defendant, and giving due consideration to the cause papers and written submissions, the court had allowed only the prayer as in subpara 2(a) above with costs of RM10,000, subject to allocatur.

[4] My full reasons for the decision are elaborated below for purposes of the defendant's appeal against the aforesaid decision and the plaintiff's appeal against part of the decision where I did not allow the prayers as set out in subparas 2(b) to (e) above.

THE CAUSE PAPERS

[5] The cause papers filed in respect of the plaintiff's application in the originating summons dated 16 June 2020 (encl 1) are as follows:

(a) the plaintiff's affidavit in support ('AIS') affirmed by its executive director, Mr Ong Kok Wai on 11 June 2020 (encl 2);

(b) the defendant's affidavit in reply (1) ('AIR') affirmed by Mr Lam Wee Yeow in Singapore on 24 July 2020 (encl 4). Mr Lam is the Director of Pan Asia Logistics Investments Pte Ltd, a company duly incorporated in Singapore and a subsidiary of Pan Asia Logistics Investments Holdings Pte Ltd ('PALI Holdings'). The defendant is wholly owned by PALI Holdings and it has authorised Mr Lam to affirm the AIR on the defendant's behalf; and

(c) the plaintiff's AIR affirmed by the same deponent on 5 August 2020 (encl 5).

SALIENT BACKGROUND FACTS

[6] The plaintiff is a private limited company incorporated in Malaysia with its business address at No 17, Jalan Angkasa Mas 5, Kawasan Perindustrian Tebrau II, 81100 Johor Bahru, Johor.

[7] The defendant is also private limited company incorporated in Malaysia with a business address at Jalan Tanjung A/6, Distripark A, Pelabuhan Tanjung Pelepas, 81560 Gelang Patah, Johor.

[8] The defendant is the owner/employer for the project known as 'Cadangan Meroboh Dan Membina Semula Perindustrian Yang Mengandungi: (i) 1 Unit Gudang Sesebuah 2 Tingkat Berserta Pejabat 3 Tingkat Dan Tempat Letak Kenderaan Berbumbung Di Aras Bumbung; (ii) 2 Unit Pondok Pegawal; (iii) 1 Unit Pencawang Elektrik; (iv) 1 Unit Kebuk Sampah; (v) 1 Unit Rumah Pump; dan (vi) 5 Unit Pondok Rehat Di Atas Lot DW1 & DW2 (Sebahagian PTD 2423), Jalan Tanjung A/2, Pelabuhan Tanjung Pelepas, Mukim Tanjung Kupang, Daerah Johor Bahru, Johor Darul Ta'zim' ('project').

[9] Pursuant to a letter of award ('LoA') dated 14 February 2017, the defendant appointed JEKS, a private limited company incorporated in Malaysia and having its business address at C2-2F, Jalan Ampang Utama 1/1, Off Jalan Ampang, 68000 Ampang, Selangor Darul Ehsan, as its main contractor for the project with a contract sum amounting to RM136,300,000.

[10] Vide a letter of acceptance dated 7 June 2017, JEKS then appointed the plaintiff as a nominated subcontractor for 'The Supply, Delivery, Installation, Testing, Commissioning and Maintenance of the Proposed ACMV System & Electrical & Associated Installation Works' in respect of the project.

[11] Subsequently, payment disputes arose between the parties in connection with the project resulting in the commencement of the following adjudication proceedings:

(a) the adjudication proceedings between JEKS and the defendant where an adjudication decision dated 25 November 2019 was made by the learned adjudicator, Mr Daniel Tan Chun Hao in favour of JEKS. The adjudicator issued his corrected adjudication decision on 13 January 2020 ('JEKS AD') reducing the adjudicated sum from RM8,782,677.03 to RM8,512,737.03. In *JEKS Engineering Sdn Bhd v PALI PTP Sdn Bhd and another case* [2021] MLJU 1627; [2021] MLRHU 1234, this court had determined the applications under ss 15, 16 and 28 of the CIPAA and in para 2 of the judgment, the court had

pronounced the decision as follows:

(i) the setting aside application was allowed in part pursuant to s 15(d) of the CIPAA whereby the sum of RM5,143,817.34 awarded by the adjudicator for variation works was set aside and JEKS was ordered to pay costs of RM18,000 to the defendant, subject to allocatur;

(ii) the part of the JEKS AD which was not ordered to be set aside was allowed to be enforced as if it is a judgment or order of the High Court pursuant to s 28 of the CIPAA, namely that the defendant is to pay JEKS the sum of RM3,368,919.69 together with simple interest thereon as ordered by the adjudicator, which is at the rate of 7.75%pa, from the date of the JEKS AD until full realisation. The quantum of costs of the adjudication proceedings to be borne by the defendant was correspondingly reduced by 60%, which is the approximate percentage of the amount that is set aside as against the sum of RM8,512,737.03. The reduced costs amount to RM60,929. No order as to costs was made for the enforcement application; and

(iii) the stay application under sub-s 16(1) of the CIPAA was dismissed with costs of RM5,000, subject to allocatur.

(b) the adjudication proceedings between the plaintiff and JEKS for an outstanding sum of RM3,440,981.83 under the subcontract, together with interest and costs which led to the Bond AD.

[12] Consequently, pursuant to s 30 of the CIPAA, the plaintiff issued its notice for direct payment to the defendant on 17 February 2020 ('said notice') following the alleged failure by JEKS to pay the amounts due and owing to the plaintiff.

[13] By way of its solicitors' letter dated 7 April 2020, the defendant denied any obligation to make payment to the plaintiff on the basis that there is no money due and owing by the defendant to JEKS.

THE PLAINTIFF'S SUBMISSIONS

[14] In a nutshell, the plaintiff contended that it has satisfied the requirements of s 30 of the CIPAA by issuing the said notice to the defendant and proving that there is money due and owing by the defendant to JEKS, by virtue of the JEKS AD, at the time that the defendant received the said notice.

[15] Further, the plaintiff argued that the defendant failed to comply with sub-s 30(2) of the CIPAA in that, upon receipt of the said notice, the defendant

did not serve a written notice to JEKS to request proof of payment made to the plaintiff. Mr Deepak relied on the case authority of *PCom Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor* [2020] MLJU 118; [2020] 1 LNS 130 in submitting that failure to issue such a written notice to JEKS is fatal to the defence that there is no money due and owing by the defendant to JEKS. In the absence of any proof of payment by JEKS, the defendant was thus compelled by sub-s 30(3) of the CIPAA to make payment of the sums stipulated in the Bond AD.

THE DEFENDANT'S SUBMISSIONS

[16] The defendant resisted the plaintiff's application based on two broad grounds, namely that:

(a) there is no money due and owing by the defendant to JEKS provision does not cover payments due under the JEKS AD and ought to be limited to debts arising from the construction contract between the defendant and JEKS. It was further contended that the plaintiff's corresponding right should only be exercised when there is a conclusive debt between the defendant and JEKS. However, in this case, there is no such debt due because it is being seriously disputed by virtue of:

(i) the ongoing arbitration proceedings between the defendant and JEKS where the defendant has claimed substantial set off against JEKS for the sum of RM22,537,672.88, not including the costs of rectification works that were still ongoing at the date of hearing of the plaintiff's application. Mr Sivabalan argued that this court should not investigate as to whether there is a bona fide debt owing by the defendant to JEKS in this action as any interference by the court is not allowed under s 8 of the Arbitration Act 2005 (Act 646) ('the AA 2005') and the defendant will be prejudiced if the arbitration proceedings concludes that there is no sum due or payable to JEKS; and

(ii) the defendant's appeal against the decision of this court in *Jeks Engineering* and the defendant will also apply to stay the execution of judgment by JEKS pending the appeal; and

(b) sub-s 30(1) and (3) of the CIPAA only allows for payment of the 'adjudicated amount', and this does not include interest and costs as prayed by the plaintiff in paras (b) to (e) in encl 1.

THE FINDINGS OF THE COURT

[17] As stated at the outset, the plaintiff's application is made pursuant to ss 30 and 31 of the CIPAA and these provisions read as follows:

30 Direct Payment from principal

(1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.

(2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.

(3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.

(4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.

(5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

31 Concurrent Exercise of Remedies

(1) Unless a stay is granted under section 16, a party who obtained an adjudication decision in his favour may exercise any or all of the remedies provided in this Act concurrently to enforce the adjudication decision.

(2) The remedies provided by this Act are without prejudice to other rights and remedies available in the construction contract or any written law, including any penalty provided under any written law.

[18] In *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor* [2020] MLJU 311, the High Court held the following view in respect of an application under s 30 of the CIPAA:

[29] ...

(1) a party (X) who has obtained an adjudication decision against another party (Y), may claim for the adjudicated amount from Y's principal (Z) if the following four conditions are satisfied (*4 Conditions*):

(a) Y has failed to pay the adjudicated amount to X (please see s 30(1) and (3) of theCIPAA) (*1st Condition*);

(b) X has made a written request for Z to pay the adjudicated amount directly to X (X's Written Request) (please refer to s 30(1) of the CIPAA) (*2nd Condition*);

(c) there is a sum of money due from Z to Y at the time of Z's receipt of

X's Written Request (please see s 30(5) of the CIPAA) (*3rd Condition*); A

(d) Z did not comply with X's Written Request and did not pay the adjudicated amount directly to X (*4th Condition*); and

(2) if Z pays the adjudicated amount directly to X, by reason of s 30(4) of the CIPAA, Z may recover the adjudicated amount from Y as a debt or set off. B

[19] I have considered the averments and submissions by the parties including the documentary evidence and it is my finding that:

(a) the plaintiff has fulfilled the condition as stipulated in sub-s 30(1) of the CIPAA as: C

(i) the plaintiff obtained the Bond AD against JEKS on 3 January 2020 (see exh 'OKW2' in the AIS, encl 2);

(ii) JEKS has failed to pay the adjudicated amount, simple interest and costs of the adjudication proceedings to the plaintiff as determined by the adjudicator in para 52 of the Bond AD (see para 12, encl 2 and subpara 3.4 in the said notice as shown in exh 'OKW3', encl 2); and D

(iii) the plaintiff has made a written request for the defendant to pay the adjudicated amount, simple interest and costs of the adjudication proceedings directly to the plaintiff vide the said notice (see exh 'OKW3', encl 2); E

(b) the defendant did not comply with the said notice and did not pay the adjudicated amount, simple interest and costs of the adjudication proceedings directly to the plaintiff. Instead, the defendant took the position that there were no monies due and owing by the defendant to JEKS pursuant to sub-s 30(5) of the CIPAA when the said notice was issued. The defendant additionally asserted that JEKS and itself were in the midst of arbitration wherein the defendant was pursuing a substantial counterclaim against JEKS (see the defendant's solicitors' letter to the plaintiff's solicitors dated 7 April 2020 in exh 'OKW4', encl 2); and F G

(c) upon receiving the said notice on 17 February 2020 as signified by the acknowledgement of receipt on the said notice, the defendant did not serve a notice in writing to JEKS for JEKS to show proof that it has paid the adjudicated amount, simple interest and costs of the adjudication proceedings to the plaintiff and to state that the defendant shall make direct payment of the same to the plaintiff after the expiry of ten working days of the service of the written notice in accordance with sub-s 30(2) of the CIPAA. H I

In *PCOM Pacific*, the first defendant did not issue the mandatory notice

under sub-s 30(2) of the CIPAA to the second defendant and the court held that this is fatal to the defence that there are no monies due and owing from the first defendant to the second defendant (see para 22 of the judgment and also paras 24 and 25 in *HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case* [2021] 8 MLJ 347). Therefore, the defendant's failure to issue the written notice to JEKS as mandated by sub-s 30(2) of the CIPAA is fatal to the defence that there is no money due or payable by the defendant to JEKS at the time of the receipt of the said notice. In the absence of any proof of payment by JEKS, the defendant was thus compelled by sub-s 30(3) of the CIPAA to make payment of the 'adjudicated amount' in the Bond AD.

[20] Based on the foregoing, the plaintiff has fulfilled all the conditions to entitle it to invoke the remedy in s 30 of the CIPAA and for the rejection of the defendant's defence to the plaintiff's application. However, that is not the end of the matter as this court must nonetheless determine the two main issues raised by the defendant as shall be examined below.

First issue: Whether there is money due or payable by the defendant to JEKS at the time of receipt of the said notice on 17 February 2020

[21] Mr Sivabalan earnestly submitted for the defendant that the money which is due or payable under sub-s 30(5) of the CIPAA should be the amount that is payable pursuant to the construction contract between the parties and should not extend to an adjudication decision or disputes under an arbitration. The learned counsel relied on the following justifications for the said submission:

(a) the winning party in an adjudication has the option of enforcing the adjudication decision pursuant to sub-s 28(1) of the CIPAA, to suspend performance or reduce the rate of progress of performance of the construction work if the adjudicated amount has not been paid as provided under sub-s 29(1) of the CIPAA or to seek direct payment from the principal under s 30 of the CIPAA. Since the remedies under ss 28 and 29 of the CIPAA are limited to the rights and obligations of the parties under the construction contract, a similar view should be taken in relation to s 30 of the CIPAA;

(b) Parliament had intended for sub-s 30(3) of the CIPAA to be enforced based on a construction contract and not an adjudication decision because sub-s 30(4) of the CIPAA provides that the principal may recover the monies paid to the winning party as a debt or set off from *any* money due or payable by the principal to the losing party. However, the word 'any' is absent in sub-s 30(2) of the CIPAA and this shows that sub-s 30(4) was intended to limit the principal's exposure to the

construction contract alone and not to anything beyond that;

(c) based on the definition of 'principal' in s 4 of the CIPAA, a principal can only be the party in a chain of construction contracts in the same project and excludes the principals who are involved with the losing party in other projects;

(d) in the other applications under s 30 of the CIPAA as seen in *Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits* [2016] MLJU 691; [2016] 1 LNS 805, *HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors* [2018] MLJU 1859; [2018] 1 LNS 1938, *B Cor Geotechnics Sdn Bhd v Panzana Enterprise Sdn Bhd* [2019] MLJU 1030; [2019] 1 LNS 1393 and *HSL Ground Engineering*), the courts have considered the evidence produced by the principal in contending that there was no money due or payable by the principal within the meaning of sub-s 30(5) of the CIPAA.

However, in this case, the application was premised on the JEKS AD and as at the date of hearing of the application, the dispute between the defendant and JEKS was before the arbitrator and the defendant has filed an appeal against the decision of this court in respect of the parties' applications under ss 15, 16 and 28 of the CIPAA; and

(e) reference was made to O 49 r 1 of the ROC 2012 and the decision of the High Court in *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, Garnishee)* [1988] 1 MLJ 434; [1988] 1 CLJ Rep 645 and an analogy was drawn with garnishee proceedings. It was submitted that the plaintiff's rights under sub-s 30(2) of the CIPAA should only be exercised when there is a conclusive debt between the defendant and JEKS whereas the adjudicated amount in the JEKS AD was not a debt due as it was being seriously disputed. The JEKS AD is temporarily binding and the scheme of the CIPAA is to ease cashflow, and not to aid a subcontractor to collect debts.

[22] At the other end of the spectrum, Mr Deepak, with no less vigor, compared s 30 of the CIPAA with s 24 of the Building and Construction Industry Security of Payment Act 2004 (Cap 30B) (Singapore) and adverted to para 27 of the judgment in *HMN Nadhir* wherein it was observed that s 30 of the CIPAA imposes a mandatory obligation on the principal/employer to make direct payment to the subcontractor once the conditions are fulfilled whereas s 24 of the Singapore Act is couched 'in the language of discretionary choice and option'.

[23] Apart from referring to the long title of the CIPAA and Part IV therein on the 'Enforcement of adjudication decision', the plaintiff's counsel took pains to refer to the Second and Third Readings of the Construction Industry

Payment and Adjudication Bill 2011 on 2 April 2012 at pp 19, 21 and 26 and on 7 May 2012 at pp 94–95 in emphasising that the purpose of the CIPAA has always been to safeguard the interests of smaller contractors and not the employers or project owners by facilitating regular and timely payments and providing remedies for the recovery of payment by contractors and subcontractors.

[24] The learned counsel also drew upon s 17A of the Interpretations Acts 1948 and 1967 (Act 388) to persuade the court to adopt a construction of s 30 of the CIPAA that would promote the purpose or object underlying the Act ie as long as there is money due or payable on the date that the said notice was issued, the plaintiff is entitled to request direct payment from the defendant and the defendant has no choice but to honour the request.

[25] The meaning of the words 'due or payable' in sub-s 30(5) of the CIPAA was considered by the court in *HSL Ground Engineering* in the following excerpt from the judgment with my added emphasis:

> [29] *It is plainly provided in* s 30(5) of the CIPAA *that the defendant is only obliged to make direct payment if there is money due or payable to CTSB. It is not due and payable*. In the English Court of Appeal case of *Videocon Global Ltd & Anr v Goldman Sachs International* [2016] EWCA Civ 130, it was held that *there is a distinction between due and payable in that a debt accrues when it is due whilst an obligation to pay arises when it is payable. They are thus not synonymous and it seems that the former is stricter when compared to the latter. In the English building contract case of Dunlop & Ranken Ltd v Hendell Steel Structures Ltd, Pitchers Ltd (Garnishees)* [1957] 1 WLR 1102 on garnishment, it was held that money under a building contract based on the RIBA form is not due for attachment until a certificate by the architect has been issued for that sum of money. It is plain that for purposes of garnishment under the then Rules of the Supreme Court of England, only debt due or accruing debt could be garnished. *Thus, in my view, if it is just payable instead of due and payable, it suffices so long there is an obligation or liability to pay upon it being properly claimed.*
>
> ...
>
> [33] *Consequently, the plaintiff here may seek for direct payment from the defendant in respect of any money due or payable. This is therefore not limited to the unpaid money due pursuant to progress certificates issued by the defendant to CTSB but any other money payable by the the notices pursuant to* s 30(1) of the CIPAA *from the plaintiff*. Ordinarily, this other money payable will include any uncertified progress claims and release of retention money. The applicable date in which the aforesaid notices were received by the defendant is 15 October 2018 and 20 September 2018 pursuant to the contract and rental agreement respectively ...

[26] I have given careful consideration to the submissions of the parties and in my view, the answer to the conundrum is not as complex as it has been made out to be.

[27] Firstly, s 4 of the CIPAA provides that 'principal' means 'a party who has contracted with and is liable to make payment to another party where that other party has in turn contracted with and is liable to make payment to a further person in a chain of construction contracts'.

[28] It is indisputable that the defendant is a party which has contracted with JEKS as its main contractor but is the defendant liable to make payment to JEKS? This liability must be assessed, as per the wordings in sub-s 30(5) of the CIPAA, 'at the time of the receipt of the request under subsection (1)' that is on 17 February 2020. On this date:

(a) the amounts as determined by the learned adjudicator which must be paid by the defendant to JEKS pursuant to the JEKS AD are payable ie there is an obligation to pay the same within 30 calendar days after receipt of the JEKS AD;

(b) the applications under ss 15, 16 and 28 of the CIPAA had been filed ie on 15, 22 and 6 January 2020, respectively, and the notice to arbitrate had been issued ie on 8 May 2019, but neither had been determined by this court and by the arbitrator, respectively; and

(c) the JEKS AD is a valid and binding decision (see s 13 of the CIPAA).

[29] The JEKS AD and Bond AD came into being because of disputes between the defendant and JEKS, and the plaintiff and JEKS, respectively, in the adjudication proceedings over claims and counter claims arising out of the same chain of construction contracts executed by these parties for the project. Essentially, monies are due or payable under the chain of construction contracts and this is fortified by the findings and conclusion of the adjudicator in the JEKS AD.

[30] Hence, the defendant's contention that the plaintiff is not entitled to seek recourse under s 30 of the CIPAA premised on the JEKS AD because it is not derived from a construction contract is misconceived. This court had the benefit of the payment claim and all the other adjudication papers and supporting documents in the *Jeks Engineering* case and the claims by JEKS against the defendant were for, among others, unpaid certified works done based on Interim Payment Certificate Nos 19, 20, 21 Rev, 22 and 23 under the LoA dated 14 February 2017 where the defendant had appointed JEKS to execute the Main Building Works for the project. The adjudicator had found, inter alia, that JEKS was entitled to a sum of RM11,820,169.69 for works done and certified but remained unpaid (see para 117 on the summary of findings on the issues in the JEKS AD).

[31] The court agrees that the interpretation of s 30 of the CIPAA which is closest to the objectives of CIPAA is as submitted by the plaintiff. It is observed

in passing that at p 479 in *Construction Adjudication in Malaysia* (2nd Ed, Sweet & Maxwell, 2018) by Lam Wai Loon and Ivan YF Loo, the learned authors had commented that the rationale for s 30 of the CIPAA is, amongst others, to provide an opportunity to the principal to avoid the possibility of the subcontractors, suppliers or consultants exercising their right under s 29 of the CIPAA to suspend or reduce the rate of progress of the performance of the works. Thus, the direct payment mechanism provides a means to the employer/project owner of ensuring that subcontractors in the chain of construction contracts continue to perform their contractual obligations and complete the works as planned. In other words, the principal stands to benefit from the mandatory direct payment provision in s 30 of the CIPAA. Moreover, the principal has the avenue of recovering whatever amounts paid to the winning party in the adjudication as a debt or set off from any sums of money due or payable by the principal to the losing party (see s 30(4) of the CIPAA). The defendant's submission that it will be prejudiced if the court allows the plaintiff's application in encl 1 and later, if the arbitrator should rule in its favor, it will not be able to recover the money from the plaintiff and/or JEKS is a submission from the bar as no averments were made by the defendant regarding this matter and no evidence was produced to support this contention.

[32] In the upshot, the defendant is a party which has contracted with JEKS as its main contractor, and is liable to make payment to JEKS by virtue of the JEKS AD, and JEKS has contracted with, and is liable to make payment to, the plaintiff by virtue of the Bond AD. The court is therefore satisfied that for purposes of s 30 of the CIPAA, the defendant is a 'principal' within the meaning of s 4 of the CIPAA and that there is money payable by the defendant to JEKS at the time when the defendant received the said notice.

Second issue: Whether the term 'adjudicated amount' in s 30 of the CIPAA includes interest and costs as awarded in the Bond AD

[33] The defendant similarly fervently submitted that the expression 'adjudicated amount' in sub-ss 30(1) and (3) of the CIPAA does not include interest and adjudication costs. In this regard, I agree with the defendant and my reasons are as follows.

[34] Apart from sub-ss 30(1) and (3), the term 'adjudicated amount' is used in ss 12(5), 16(2), 25(o), 28(2) and 29(1), (2) and (4)(d) of the CIPAA.

[35] In *Construction Adjudication in Malaysia*, the learned authors at p 480 opined that the principal is only obligated to make payment to the extent of the sum due or payable by the principal to the losing party, or the adjudicated amount, whichever is lower.

[36] The words 'adjudicated amount' are not defined in s 4. As submitted by the defendant, the words 'adjudication decision', 'adjudicated amount', 'interest' and 'costs' are used in the CIPAA but only a definition for 'adjudication decision' is provided in s 4 to mean 'the decision made by and adjudicator under sub-s 12(2). Subsections 12(2) and (4) of the CIPAA provide that:

> 12 Adjudication and Decision
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> (2) Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within —
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> (a) forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;
>
> (b) forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or
>
> (c) such further time as agreed to by the parties.
>
> ...
>
> (4) The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties ...

[37] In view of the language in both subsections as quoted above, in my opinion, 'adjudication decision' means the entire decision made by the adjudicator and not, as has been submitted by some counsels in other cases before this court, that it relates to only the 'dispositive part' of the decision of the adjudicator where the final determination is made and the terms of the award or the decision in respect of the claimant's claim is set out.

[38] Moving further, the word 'interest' in its monetary sense can be found in ss 24(a), 25(o) and 28(2) of the CIPAA. Subsection 28(2) provides that 'the High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable'. It is obvious from the structure of the sentence in sub-s 28(2) that the words 'adjudicated amount' cannot include interest.

[39] The word 'cost' or 'costs' appears in ss 17(2), 18(1) and (2), 25(o) and 36(1)(d) of the CIPAA.

[40] By using these different words, 'adjudication decision', 'adjudicated amount', 'interest' and 'costs' in the CIPAA, and especially where this is done repeatedly, the legislature must have intended to refer to different things (see *Lee Lee Cheng (F) v Seow Peng Kwang* [1960] 1 MLJ 1).

[41] As for the term 'adjudicated amount' in sub-s 30(3) of the CIPAA, I am

persuaded by Mr Sivabalan's argument that if Parliament had intended for a principal to pay the adjudicated amount, interest and costs pursuant to that provision, the august body would have expressly stated so.

[42] In so far as case authorities are concerned, the defendant relied on para 26 in the judgment of the Court of Appeal in *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 MLJ 362; [2019] 2 CLJ 229, a case which is often cited for the legal principles in relation to an application under s 28 of the CIPAA, and on para 22 in the judgment of the High Court in *Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd* [2021] 8 MLJ 275 which dealt with, among others, the issue as to whether a judgment under sub-s 28(2) of the CIPAA which is relied upon as a debt in the statutory demand under s 466 of the Companies Act 2016 ('Act 777') is a 'disputed debt'. The relevant excerpts from these two cases are shown below for the convenience of reference:

Paragraph 26 in *Inai Kiara*'s case:

> [26] By this, we mean that the adjudication decision has not been set aside or stayed, that there is no written settlement of the subject matter between the parties, or that there is no final decision rendered on the payment claim, whether made in arbitration or by a court of law. Once these matters are established as matters of fact, the order to enforce ought to be granted. When making the order, the High Court may also make appropriate orders in respect of the whole or part of the adjudicated sum including make orders on interest — see sub-s 28(2).

Paragraph 22 in *Maju Holdings*'s case:

> [22] In fact, s 28(2) further empowers the High Court to order interest on the adjudicated amount to be payable even if the adjudication decision does not provide for the same. This must suggest that such judgment or order so made is a judgment or order of the High Court that is no different from any other judgments or orders that the High Court in the discharge of its judicial powers ordinarily makes. Undoubtedly, the High Court's powers to order interest and for that matter also the costs for the application will result in additional legal obligations imposed on the debtor which are not part of the adjudication decision. It cannot be the case that such orders are deemed as judgment or order of a court of law and yet, the orders made at the same breath in terms of the adjudication decision are not considered as judgment or order of a court of law.

[43] In his submissions, Mr Deepak again referred to the decision in *PCOM Pacific* as well as in *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2017] MLJU 2275; [2018] 1 LNS 380 (HC). However, as acknowledged by the learned counsel, the case which directly dealt with the meaning of the term 'adjudicated amount' in sub-s 30(3) of the CIPAA is *Cabnet Systems*. In ordering the second defendant/principal in that case to pay the plaintiff the adjudicated sum and pre and post adjudication decision interest excluding the adjudication costs, Wong Kian Kheong J reasoned that:

> [34] I am of the view that the expression 'adjudicated amount' in ss 12(5), 30(1) and

(3) of the CIPAA means only the following sums of money:

(1) the Adjudicated Sum claimed by the plaintiff against SSB;

(2) Pre-AD Interest; and

(3) Post-AD Interest.

In my opinion, the expression 'adjudicated amount' in ss 12(5), 30(1) and (3) of the CIPAA cannot include Adjudication Costs given by the adjudicator pursuant to s 18(1) of the CIPAA. This opinion is premised on the following reasons:

(1) Parliament has used the words 'adjudicated amount' in ss 12(5), 30(1) and (3) of the CIPAA. The term 'costs of the adjudication proceedings' is employed by the legislature in s 18(1) of the CIPAA. In s 28(1) and (2) of the CIPAA, Parliament provides that the court may grant leave to 'enforce the adjudication decision'.

In *Lee Lee Cheng v Seow Peng Kwang* [1960] 1 MLJ 1, at 3, Thomson CJ (as he then was) has decided in the Federation of Malaya's Court of Appeal that when different words are used by the legislature in a statute, those different words in the statute are intended by the legislature to refer to different matters. Accordingly, the expression 'adjudicated amount' in ss 12(5), 30(1) and (3) of the CIPAA cannot include adjudication costs as provided in s 18(1) of the CIPAA and

(2) If Parliament had intended for a principal to pay the entire sum given in an adjudication decision (both the adjudicated amount and adjudication costs) pursuant to s 30(3) of the CIPAA, Parliament would have —

(a) expressly stated in s 30(3) of the CIPAA that the principal shall pay both the adjudicated amount and adjudication costs; or

(b) used the same wording in s 28(1) and (2) of the CIPAA that the party who has obtained an adjudication decision in his or her favour can enforce the adjudication decision (which includes the adjudicated amount and adjudication costs) against the principal.

[44] Although the plaintiff relied on the definitions of 'adjudication decision' and 'adjudication proceedings' in s 4 of the CIPAA and the wordings in sub-s 18(1) and s 25(o) of the CIPAA in submitting that the 'adjudicated amount' AD, inclusive of all interest and costs, I am not convinced that this court ought to take a different view from that expressed in *Cabnet Systems*.

[45] In fact, I am prepared to go further by accepting the defendant's contention that the term 'adjudicated amount' in sub-s 30(3) of the CIPAA does not include interest because in *CT Indah*'s case, the adjudication decision was for the principal sum of RM9,065,335.67 in favour of the plaintiff and further, for legal costs of RM20,000 and the adjudication costs of RM86,591.82 together with interests at the rate of 5%pa on the said principal sum from 19 July 2016 to 13 October 2016. Subsequently, the plaintiff's solicitors issued a request to the defendant for direct payment of the sums

awarded to the plaintiff pursuant to s 30 of the CIPAA (see paras 8 and 12 in the judgment of the High Court). The High Court dismissed the plaintiff's application. However, the plaintiff's appeal to the Court of Appeal was allowed.

[46] It is noted that in the decision of the Court of Appeal as reported in [2019] MLJU 1215; [2020] 1 CLJ 75, it is stated that the learned adjudicator awarded a principal sum of RM9,065,335.67 together with interest and costs to the appellant (see para 3 of the judgment) and later, the court held that:

> [15] We agree with learned counsel for the appellant that a legal obligation to pay may arise either by statute (as in the present case) or by contract. In fact, an obligation imposed by statute, in this case by sub-s 30(3) of CIPAA, is stronger because in the absence of proof of payment by BHL Builders as requested by the respondent under sub-s (2), it becomes mandatory for the respondent as the principal to pay the adjudicated sum of RM9,065,335.67 to the appellant. It is a requirement of law which the respondent has no discretion not to comply with it.
>
> ...
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> [22] These authorities are only of persuasive value but they do in our view support the appellant's contention that despite BHL Builder's status as a bankrupt, the respondent is bound by statute, ie, by s 30(3) of the CIPAA, to make direct payment to the appellant of the adjudicated sum of RM9,065,335.67.

[47] My understanding of the two paras as quoted above is that the principal was bound by statute to make direct payment of the principal sum only, excluding interest and costs. Even if I am wrong in my reading of the judgment of the Court of Appeal, I hold the view that if interest and cost were intended to be included within the meaning of 'adjudicated amount' in sub-ss 30(1) and (3) of the CIPAA, express words to that effect would have been inserted in the sub-ss as the terms 'interest' and 'costs' are used in the other parts of the CIPAA.

[48] In the premises, I find and hold that the words 'adjudicated amount' in sub-ss 30(1) and (3) of the CIPAA do not include interest and costs and thereby, prayers (b) to (e) in encl 1 cannot be allowed.

CONCLUSION

[49] Following from the above justifications, only prayers (a) and (f) in the plaintiff's application in encl 1, namely for direct payment of the sum of RM3,387,425.44 to be made by the defendant to the plaintiff and costs of RM10,000 for the application as offered by the defendant, and subject to allocatur, that were allowed by this court.

Application allowed in part.

Reported by K Selvaraju